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IN THE

Supreme Court of the United States

October Term, 1949.

No. 225

THE ANDREW JERGENS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR PETITIONER IN REPLY TO ANSWER OF RESPONDENT.

Having filed herein a petition for certiorari, and the respondent National Labor Relations Board having filed a brief in opposition thereto which is misleading, the Petitioner, The Andrew Jergens Company, a corporation, submits this brief in reply thereto.

I.

An Order to Bargain with a Union No Longer Representing Any Employees of Petitioner and Which Lack of Representation the Board Did Not Consider, Should Not Be Enforced.

In the Court of Appeals, and in its petition for certiorari (pp. 19-30), Petitioner has contended that the order to bargain with the Teamsters should not be enforced, inasmuch as it is admitted by all parties that the Teamsters does not represent any employees of Petitioner at this time, a fact which the Board did not consider in framing its order. In fact the Trial Examiner found that the Teamsters did represent a majority of the employees [R. 23-24], and the Board expressly stated in issuing the order that the Teamsters represented a majority of employees [R. 110].

The Board, in its brief (p. 13), has contended that it always assumes that any loss of majority subsequent to unfair labor practices is to be attributed to those unfair labor practices, and cited for that principle *The Matter of Karp Metal Products Company, Inc.,* 51 N. L. R. B. 621, 624-626. The Board necessarily contends, of course, that such assumption is made in all cases as a matter of law without regard to the circumstances. Apart from the validity of such presumption it is submitted that the Board has not established or shown that any such presumption exists among the decisions of the Board. The case cited for the presumption, *Matter of Karp Metal Products,* does not appear to establish any such principle, and it will be observed that that case lists at great length, and treats as material, the long history of violent and flagrant unfair labor practices committed by the employer.

Only one case need be cited to disprove the existence of such a presumption. In *Matter of Fainblatt,* the Board had found the employer guilty of unfair labor practices, including a refusal to bargain with the Union, and ordered the employer to bargain with that union. The Board petitioned the Court of Appeals for the Third Circuit for enforcement, and the employer filed a petition to adduce additional evidence, part of which evidence would show a shift in union representation due to an increase in number of employees. This petition was granted, and the matter remanded to the Board. The Court of Appeals' decision is apparently not published, but the Board's decision on remand completely and unequivocally refutes the Board's position here as to the existence of its asserted presumption, for the Board on remand found that it would not effectuate the purposes of the Act to require the employer to bargain with the Union whose majority representation was in doubt. The Board stated there, 4 N. L. R. B. 596, at 600-601:

> "The Board therefore reiterates what it said in regard to the violation of Section 8 (5) of the Act. That violation is not affected by any subsequent change in the situation. However, testimony that the number of permanent employees in the plant has risen from 59 to approximately 200 is uncontradicted. Two years have now elapsed since the respondents' first refusal to bargain collectively, which precipitated the strike. The Board has no evidence before it as to the present membership in Local No. 149 among the greatly increased force now employed. In view of these circumstances, the Board will amend its order by striking out that part which requires the re-

spondents to bargain collectively with Local No. 149. * * *"

Matter of Fainblatt, 4 N. L. R. B. 596, at 600-601.

The above case conclusively establishes that this matter must be remanded to the Board and its consideration of the loss of majority required. In this connection, it is interesting to note that of the cases cited by Petitioner (brief supporting petition, pp. 14, 21-22) which remanded the matter to the Board for consideration of loss of majority, the Board took no further action in any of them except *Matter of Karp Metal Products Company*, relied on by the Board to establish the presumption. Such timidity is hardly consistent with the existence of such a presumption.

The Board states, however, that its legal presumption has been approved by this Court on numerous occasions, citing therefor page 14, footnote 4, several decisions of this Court. These decisions cited by the Board were discussed in the petition and it is clear that those cases in no way involve the problem presented here.

In all of those cases *the Board was aware before it issued its order to bargain that the union in question no longer represented a majority of the employees.* In all of those decisions the Board considered the loss of such majority and came to the conclusion that it would be necessary, in order to effectuate the purposes of the act, to require the employer to bargain with the union. The decisions of this Court cited by the Board simply affirm that

in such circumstances the Board may require an employer to bargain with a minority union. Far from being any support for the Board's contention, these cases recognize that it is necessary for the Board to consider the loss of majority before the employer can be required to bargain with a minority union. So clear is this distinction that Petitioner has taken the space to list below the cases cited by the Board and quote short excerpts therefrom to show that they do not support the Board's position, but, on the contrary, give support to the Petitioner's position:

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, involved a situation in which the Court of Appeals held that the order to bargain could not be enforced because such a length of time had elapsed since the order that it could not be supposed that the union still represented a majority of the employees. The Court reversed such decision of the Court of Appeals *because the Board had in fact considered the loss of majority* and this Court stated:

> ". . . *The Board had considered the effect* of a *possible shift in membership,* alleged to have occurred subsequent to Lorillard's unfair labor practice. But it had reached the conclusion that in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine, . . ." (Emphasis added.)
>
> *National Labor Rel. Bd. v. P. Lorillard Co.,* 314 U. S. 512, 513; 86 L. Ed. 382-383.

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, is also a case in which the Board considered the loss of majority. This is clear from the following excerpt of the opinion of this Court:

> "In reaching its conclusion as to the appropriate remedy for these unfair practices, *the Board considered petitioner's contention that during the seven-month interval between the filing of the charges and the issuance of the complaint, thirteen of the Union's original members had been replaced by new employees in the normal course of business.* This left the Union with only thirty-two of the eighty-five employees then in the unit which it represented, or *less than a majority.* * * *" (Emphasis added.)
>
> *Franks Bros. Co. v. National Labor Rel. Bd.,* 321 U. S. 702, 703; 88 L. Ed. 1022.

The *Franks* case gives particular support to Petitioner's position herein, as shown by the manner in which the Court discussed the *P. Lorillard Company* case, *supra,* and the case of *National Labor Relations Board v. Fansteel Metallurgical Corp.,* 306 U. S. 240. This discussion is quoted in Petitioner's brief supporting its petition, pages 24-25.

National Labor Relations Board v. Bradford Dyeing Assoc., 310 U. S. 318, is directly contrary to the Board's contention that there is a conclusive legal presumption such as it describes, and is in fact in direct support of Petitioner's contention that the Board must consider the loss of majority before ordering the employer to bargain with a minority union. This is reflected in the following quotation from the decision of this Court:

> ". . . However, *the Board found that 'the record is clear that, had it not been for the unfair labor*

practices of the respondent in organizing and fostering the Federation and in persuading, intimidating and coercing its employees to join the Federation and leave the T. W. O. C., the *respondent's employees would have remained members of the T. W. O. C.*'" (Emphasis added.)

National Labor Rel. Bd. v. Bradford Dyeing Assoc., 310 U. S. 340; 84 L. Ed. 1241.

International Association of Machinists etc. v. National Labor Relations Board, 311 U. S. 72, involved a case in which an intervening union contended at the Board's hearing that it represented a majority of the employees and that the union with which Petitioner was ordered to bargain no longer represented a majority of the employees. The decision of this Court in that case makes it clear that before an employer may be required to bargain with a union which does not represent a majority of its employees the Board itself must give consideration to the cause of such loss of majority and exercise its discretion as to the proper method of correcting the results of the unfair labor practices. The decision of this Court states:

". . . *Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority,* the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. *That necessarily involves an exercise of discretion on the part of the Board*—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is *for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged.*" (Emphasis added.)

International Assoc., etc. v. National L. Rel. Bd., 311 U. S. 82; 85 L. Ed. 57.

By what manner of reasoning the Board reaches its conclusion that the above cases give support to its position, and to the validity of its presumption, is beyond the comprehension of this counsel. In all these cases the Board gave the consideration to the loss of majority representation which Petitioner seeks to require it to give here. In affirming the Board's action this Court made it clear in those cases that if the Board had not given such consideration to the loss of majority the order would not have been enforced.

The Petitioner in its petition and supporting brief (pp. 14, 21) cited several cases as being directly in conflict with the decisions of the Court of Appeals below in holding that although the Board did not consider the loss of majority, and although the Board even assumed that the union did represent a majority, the Petitioner would nevertheless be required to bargain with the union without the necessity of any consideration by the Board of the loss of majority.

The Board attempts to distinguish those cases (pp. 15-16 of its Brief), and the manner in which it does so suggests that the Board has not at all understood the question involved in this petition.

The case of *National Labor Relations Board v. Inter-City Advertising Co., Inc.*, 154 F. 2d 244 (C. A. 4), relied upon by Petitioner, was one in which the Board apparently invoked its so-called legal presumption and which the Court of Appeals refused to recognize. It is clear from the opinion (154 F. 2d at 247) that the Court holds that such a presumption is not conclusive, and recognizes that there are cases in which a loss of majority occurring subsequent to unfair labor practices may be attributed to reasons other than unfair labor practices, in

which cases the Board abuses its discretion in requiring the employer to bargain with the minority union. The Board's distinction of this case amounts to no more than a naive argument that since its error committed in that case was greater than the error comimtted in this case, this Petitioner should not be heard to complain.

The case of *National Labor Relations Board v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661 (C. A. 5), relied upon by Petitioner, was distinguished in the Board's brief (p. 16) with the simple statement that that case did not involve any bargaining order. While that case did not involve an order to bargain as such, sections A and B of the Board's order (21 N. L. R. B. 306, 446) required the employer to cease and desist from dominating or interfering with a specified union (Etowah) by contributing support to such union, and also from recognizing that union as the representative of its employees. The case is surely in point as support for Petitioner's position as reflected by the following statement in the decision of the Court of Appeals:

> ". . . The proper course, as to whether Etowah does now, and its right as affected by company domination and support to, represent the employees, is, retaining jurisdiction of the case on that issue, to remit it to the Board for further hearing and findings."
>
> *National Labor Rel. Bd. v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 667.

The cases of *National Labor Relations Board v. American Mfg. Co.*, 106 F. 2d 61 (C. A. 2), modified and affirmed 309 U. S. 629; *National Labor Relations Board v. National Licorice Co.*, 104 F. 2d 655 (C. A. 2), modified on other grounds 309 U. S. 350; and *Stewart Die*

Casting Corp. v. National Labor Relations Board, 114 F. 2d 849 (C. A. 7); relied upon by Petitioner, were distinguished by the Board on the ground of having been decided prior to the decision of this Court in the cases of *National Labor Relations Board v. P. Lorillard Co.,* 314 U. S. 512; *Franks Bros. Company v. National Labor Relations Board,* 321 U. S. 702. This represents another instance of the Board's ostrich-like persistence in refusing to acknowledge the holdings of the latter cases, which have been discussed above and which clearly support the cases relied upon by Petitioner.

In fact, in the *American Mfg Company* case, the Court of Appeals held, 106 F. 2d 61, 68-69, that the order to bargain could not be enforced, because, due to the lapse of time, the Court did not feel that there was any certainty that the union represented a majority of the employees. The Court of Appeals made its order enforcing the order to bargain conditional upon the Board's ascertaining by an election whether the union represented a majority of the employees. This Court granted certiorari in that case in 309 U. S. 629 and modified the order in a particular which is in no way material here, and expressly stated that in all other respects the order, of the Court of Appeals, was affirmed. While the decision of this Court in that case was a memorandum decision, it is an express affirmance of the principle relied upon by Petitioner and completely refutes the contention of the Board that this Court has approved its so-called legal presumption. This Court there clearly demonstrated that the Court of Appeals, in its decision below, was in error in holding that the Board did not have to consider the loss of majority in a situation where, as here, the Board expressly stated in its decision that it assumed that the union at that time represented a majority of the employees.

II.

The Conclusive Legal Presumption Asserted by the Board, if It Exists at All, Is an Improper Exercise of the Board's Powers Under the Provisions of the Labor Management Relations Act of 1947.

Under the Wagner Act, the National Labor Relations Act of 1935, the Board's history of deciding cases upon its "expertness" is familiar to all. The conclusive legal presumption asserted by the Board here is a typical example of the Board's exercise of its supposed "expertness;" it is a typical example of how, under the Wagner Act, the Board sought, and succeeded, in dispensing with the necessity that it have sufficient evidence to support its findings and conclusions; it is a typical example of its theoretic thinking in these cases.

However valid such presumptions and methods may have been under the Wagner Act, it would seem clear that under the Labor Management Relations Act of 1947 the Congress desired to remove entirely the basis of "expertness" from the Board's discretion and require it, as it does of other tribunals, to decide only upon evidence.

As pointed out in Petitioner's brief (p. 28), supporting its petition, the managers of the bill in the House stated, H. R. 510, 80th Congress, pp. 55-56, in referring to the requirement of the Taft-Hartley Act, with respect to evidence, "The language also *precludes the substitution of expertness for evidence* in making decisions." (Emphasis added.) The Conference and House reports discuss at some length the criticisms which have been leveled at the Board's use of its "expertness" in place of evidence and points out the tremendous abuses such substitution has

caused in the exercise of the Board's powers. This report states, pages 40-41, H. R. 245, 80th Congress:

> "However repugnant to the courts the Board's decisions may seem, the act, by making the Board in effect its own Supreme Court so far as its findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses.
>
> "Courts often have deferred to the assumed expertness of the Board when their own judgment would lead them to disagree. The Board's expertness is largely theoretic. . . .
>
> "Requiring the Board to rest its rulings upon facts, not interferences [*sic*], conjectures, backgrounds, imponderables, and presumed expertness will correct abuses under the act.
>
> "The bill does this, by providing in section 10(b) of the amended Labor Act that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure'."

It is not to be assumed that the Board's presumption was valid even under the Wagner Act. In Petitioner's brief (pp. 25-27) supporting its petition, are discussed the decisions of this Court of *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177 and *Jacob Siegel Co. v. Federal Commission,* 327 U. S. 608, which clearly hold that the Board must give consideration to all matters which affect its choice of remedies.

The Board's brief (pp. 14, 16), refers to the decision of this Court in *National Labor Relations Board v. Jones*

and Laughlin Steel Corp., 331 U. S. 416, and considers it support for the Court of Appeals' action in invoking the presumption with respect to the loss of majority without remand to the Board. That case involved a change in the unit content, a matter which clearly can be reduced to a stable rule, and a matter of small importance and effect when compared with the loss of majority representation which involves the right of employees to choose their representative and appropriateness of the remedy. Furthermore, before relying upon that case the Board must conclusively show that it would apply a stereotype formula if remanded, which it clearly has not done.

It is, therefore, the Petitioner's position, with respect to loss of majority, that the Court of Appeals' decision is in direct conflict with the decisions of the courts of other circuits and with the decisions of this Court. It is also submitted that the Court of Appeals itself was the creator of this conclusive legal presumption and not the National Labor Relations Board, which, of course, is a complete usurpation of the function of the Board. It is further submitted that even if the Board has such a legal presumption as it describes, the decisions of the Courts of Appeals are in conflict as to whether such a presumption is valid, as reflected by the decision of the Court of Appeals below and the decision, among others, of the Fourth Circuit in *National Labor Relations Board v. Inter-City Advertising Company*. It is finally submitted that apart from all these considerations, and even assuming that the Board does have such a legal presumption as it urges here, such a procedure is invalid under the provisions of the Labor Management Relations Act of 1947, which requires that the Board use evidence in lieu of its "expertness."

III.

The Lack of Substantial Evidence to Support the Board's Findings.

The Board's brief (p. 17) states that this question is not one warranting review. Just what is meant by this statement is not understood by this counsel, as Petitioner has urged at every opportunity, before the National Labor Relations Board, Court of Appeals, both in the original hearing and in the petition for rehearing, and in its petition for certiorari in this Court, that there was no substantial evidence to support the Board's findings of facts.

Especially is this true of the Board's finding that Petitioner put forth its position with respect to the effect of the War Labor Board order in bad faith. There was a direct conflict in the evidence as to which party it was who urged the other to join with it in a petition to the War Labor Board to secure a clarification of this order. Each party testified that it made such a request of the other party but that no co-operation could be secured. Yet, the Board expressly states in its decision that it need not resolve this conflict as to which was the moving party in seeking clarification of the War Labor Board order.

At page 450 of the record, the following testimony was given by Petitioner's witness:

> "Q. And Mr. Stevenson refused to join you in any application to the War Labord Board? A. That is right."

Other testimony with respect to the many efforts made by Petitioner directly to the War Labor Board to have it modify its order is contained in the record at the following references: R. 464, 422, 447. And of great interest in connection with whether Petitioner was sincere in expressing doubt as to the effect of the War Labor Board

order is the testimony [R. 448] that the Conciliation Commissioner, Mr. Oliver Goodwin, explained to the union representatives that the company's statement that its disregard of the War Labor Board order might cause Petitioner to be unable to deduct the compensation paid was, in the opinion of Mr. Goodwin, correct.

With such evidence in the record, the Board finds that since, *in its opinion,* the War Labor Board order had no legal effect, that, therefore, Petitioner's position with respect to the order was a refusal to bargain, expressly stating [R. 108, footnote 6] that it *does not resolve* the evidentiary conflict as to which of the parties sought modification and clarification of the War Labor Board order. The most illuminating evidence of Petitioner's good faith was in this manner ignored by the Board.

It is inconceivable that counsel for the Board can seriously and sincerely contend that the question of whether there was substantial evidence to support the findings is not one warranting review. The same may be stated as to many other findings of fact made by the Board in an arbitrary manner in total disregard of the realities of the situation and evidence. (See especially, Petitioner's Brief supporting petition pp. 45-49.)

The argument put forth under this title is also contained, and enlarged upon, in Petitioner's brief (pp. 49-53) supporting its petition. The only attention the Board's brief gives such argument is its dogmatic statement that the question does not warrant review. It is respectfully submitted that the Board's recalcitrance in avoiding substance and reverting to dogmatism, by which method it gives no assistance to this Court, should be considered an admission that the Board has no merit to its position sufficient to support argument and discussion.

IV.

The "Unilateral" Wage Increase Was Not a Refusal to Bargain Inasmuch as the Same Increase Had Been Offered to the Union.

See brief supporting petition, pages 42-45.

In the Board's brief (p. 21), the Board makes reference to the record in several places for the proposition that the Board found that the wage increase granted had never been negotiated upon by Petitioner and the Teamsters. The references made by the Board are not findings of fact but are more in the nature of conclusions of law and it is those conclusions which we here attack. It is admitted by Petitioner that it granted a 15 per cent wage increase and that it did not negotiate that increase with the Union immediately prior to putting it into effect. The Petitioner even admits that in its negotiations with the Teamsters, on January 17, 1946, in which wages were discussed, that the figures "15%" were not mentioned. However, the parties did discuss wages at this meeting, and, as shown by the testimony of the union representatives, the parties were in agreement on wages, and wages presented no obstacle. [R. 26, 28, "Nobody reached a disagreement until we came to the question of union security."] The exact agreement which was made with respect to wages was "that the regular scale throughout the country would probably prevail and we could come to an agreement on that" [R. 30] and also "Well, we are demanding 30% increase, but that is not a matter standing in the way. If we get this union security clause fixed up, why we will go on with whatever the big boys do back in Washington." [R. 34.]

In Petitioner's argument in its brief, to the effect that it had offered a 15 per cent increase to the union previous to putting it into effect, it had in mind that the union had agreed that whatever increase which was established by national industries in general would be satisfactory to it. The Court may take judicial notice, because it is a matter of common knowledge, that during the period involved here, which was the reconversion period, the post-war wage level was being set and eventually concluded to be general wage raises from 15 to 18½ cents per hour. The wage increase, put into effect on July 1, 1946, was in keeping with that national increase with which the union had agreed.

Petitioner contends, therefore, that the wage increase was not, in fact, "unilateral," as the union had agreed to the wage increase by means of agreeing to an external standard to which the wage increase was equal. In any event, whether viewed as a unilateral increase or not, the amount given was within that negotiated with the Teamsters, and is, therefore, within the scope of the approval given such increases by this Court, in *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918. See Petitioner's brief supporting petition, pp. 44-45.

The Board's brief (p. 21) states that the question of this wage increase is not properly before this Court. No reason is given to support that assertion. It is an assertion which manifestly is without ground or reason, without merit or support, uttered with the realization that its success lay only through its smug audacity. It is such reasoning, devoid or reality and substance, which Petitioner urges is the basis of the Board's error.

V.

Conclusion.

The Other points urged by Petitioner in its brief supporting the petition, only some of which are referred to in the Board's brief herein, will not be reargued here.

Such other points consist in the Court of Appeals' failure to determine the applicability of the amendments of the Taft-Hartley Act (brief supporting petition pp. 31-34); that the Court of Appeals exceeded its function of review by substituting findings of its own, considering facts not of record, and going beyond the Board's basis for its order (brief supporting petition pp. 34-41); the effect of the Union's refusal to bargain in good faith (brief supporting petition pp. 45-49); and the scope of the order (brief supporting petition pp. 54-55). With reference to the scope of the order, the Board's brief (p. 22) repeats its often-stated dogmatic assertion that the question is not properly before the court, and makes its only attempt to support such assertion by stating (p. 22) that the Petitioner did not except to the breadth of the Trial Examiner's recommended order. This is indeed an amazing statement, inasmuch as Petitioner obviously did except to the scope of the recommended order as shown by the 63rd exception to the Intermediate Report, R. 102.

In Petitioner's brief supporting petition (pp. 34-35), we stated that 16 lines contained in the Court's decision and dealing with Petitioner's history with the Cosmetic Workers Union was nowhere in the record and was an example of how the Court considered facts not of record. In the Board's brief (pp. 18-19) this material from the Court's opinion is quoted and it is stated that these facts are to be found in the earlier representation case which

was certified by the Board to the Court below as part of the record, and citing the record [pp. 1 and 2]. This is another glaring inaccuracy on the part of the Board. The references to the record were nothing more than a list of the matters certified and the certification itself is contained in the record at pages 17 and 18. The most cursory glance will show that none of the facts recited by the Court are contained in this certification and that, in fact, this certification does not even mention the Cosmetic Workers Union.

The further points listed in this title are not re-argued because their coverage in Petitioner's brief supporting the petition is sufficient in itself to dispose of any answer made thereto in the Board's brief. These other points are not de-emphasized however, and any one of them is sufficient for a reversal of the Court of Appeals.

The enormity of the error of the decision of the Board and Courts of Appeal are of such nature and conflicting import with the decisions of this Court and other circuits that certiorari should be granted.

Dated September 26, 1949.

Respectfully submitted,

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